

SPEEDY TERMINATION OF ALASKA NATIVE PARENTAL RIGHTS: THE 1998 CHANGES TO ALASKA'S CHILD IN NEED OF AID STATUTES AND THEIR INHERENT CONFLICT WITH THE MANDATES OF THE FEDERAL INDIAN CHILD WELFARE ACT

SHERI L. HAZELTINE*

This Article examines the problems with the new Child in Need of Aid ("CINA") statutes and how these problems have affected Alaska Native families. The Article discusses how the new CINA statutes have failed to incorporate the special protections found under the federal Indian Child Welfare Act ("ICWA") for cases involving Alaska Native children. It argues for the amendment of

Copyright © 2002 by Sheri L. Hazeltine. This Article is also available on the Internet at <http://www.law.duke.edu/journals/19ALRHazeltine>.

* B.S., University of Kansas, 1987; J.D., University of Kansas School of Law, 1989. Formerly a prosecutor with the District Attorney's office in Fairbanks; Indian Child Welfare Act ("ICWA") attorney with the Tanana Chiefs Conference, Inc., in Fairbanks; administrative law judge with the Alaska Department of Revenue in Juneau; and an attorney employed as an ICWA specialist with the Central Council Tlingit and Haida Indian Tribes of Alaska in Juneau. The author is currently in private practice.

The author would like to thank MaryAnn VandeCastle, research analyst with the State Division of Family and Youth Services, for her generous assistance in providing state statistics; Tom Wagner for his ideas and support; members of the Alaska Native Law Section of the Alaska Bar Association; and members of the informal statewide network of tribal attorneys (including Craig Dorsay and B.J. Jones) for their assistance. The author also extends a very special thanks to Michael J. Walleri, Will Mayo and Don Shircel for teaching her the importance of enforcing the ICWA and for their dedication to the preservation of tribal rights.

the State's CINA laws to incorporate the special requirements under the ICWA applicable in Indian child welfare proceedings.

I. INTRODUCTION

*[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.*¹

The rates of termination of parental rights and adoption of children from Alaska state foster care have exploded in recent years. The dramatic increase resulted from new and stricter child protection laws passed by the Alaska Legislature in 1998 that make it easier to terminate Alaska Native and non-Native parental rights.² The legislature passed these new child protection statutes to conform with the federal Adoption and Safe Families Act of 1997 ("ASFA").³

The new Child in Need of Aid ("CINA") statutes have affected Alaska Native families in drastic ways. This Article will discuss how the new deadline requiring the State to file termination petitions after a child has been in state custody for fifteen out of the past twenty-two months has accelerated the termination of Alaska Native parental rights. It will also show that special protections found under the federal Indian Child Welfare Act of 1978 ("ICWA") involving Alaska Native children were not incorporated into the new CINA statutes.⁴ The CINA statutes instead make it easier to terminate Alaska Native parental rights and fail to protect the best interests of Indian children as defined under the ICWA.

This Article will also examine the respective histories and different purposes and goals of the ICWA and the ASFA. In light of the special protection given to Alaska Native parental rights under the ICWA, the Article argues that the State's CINA laws should be amended to incorporate the special requirements under the ICWA for Indian child welfare proceedings.

1. Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. § 1901(3) (1994).

2. ALASKA STAT. §§ 47.05.065-.100 (Michie 2000); *see* 1999 Alaska Sess. Laws ch. 99 § 33.

3. *See* ALASKA STAT. §§ 47.10.005-.142 (Michie 2000); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.). The new Child in Need of Aid ("CINA") statutes were enacted under Alaska HB 375 by the Alaska Legislature on May 27, 1998, signed into law by Governor Knowles less than a month later and were effective September 14, 1998.

4. ICWA, § 1901 (1994).

II. THE FEDERAL INDIAN CHILD WELFARE ACT OF 1978

[C]ulturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their people.⁵

The ICWA is one of the most important and far-reaching pieces of legislation protecting Indian tribes. The legislation was passed in 1978 after many years of congressional hearings, letters to Congress and studies showing the widespread and unnecessary removal of Indian children from their homes by well-meaning social workers and placement of these children in white homes for assimilation.⁶ Studies conducted in 1969 and 1974 showed that twenty-five to thirty percent of Indian children were separated from their families and tribes by placement in foster homes, adoptive homes or institutions.⁷

To understand why the Act was passed, and thus to comprehend its importance to Alaska Natives, we must look at two historical periods pre-dating the ICWA: the Boarding and Mission School Era (1880s to 1950s) and the Indian Adoption Era (1950s to 1970s).⁸ Both periods involved social welfare policy supporting

5. *Hearing on S. 1214 before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong. 193 (1978) (statement of Calvin Isaac, tribal chief of the Mississippi Band of Choctaw Indians).

6. Lila J. George, *Why the Need for the Indian Child Welfare Act?*, 5 J. OF MULTICULTURAL SOC. WORK 165 (1997); Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 327, 369 (1986); William Byler, *Removing Children: The Destruction of American Indian Families*, C. R. DIG. 19 (Summer 1977). Byler states:

In Minnesota, Indian children are placed in foster care or in adoptive homes at a per capita rate five times greater than non-Indian children. In Montana, the ratio of Indian foster care placement is at least 13 times greater. In South Dakota, 40 percent of all adoptions made by the State's Department of Public Welfare in 1967-68 are of Indian children, yet Indians make up only 7 percent of the juvenile population. The number of South Dakota Indian children living in foster homes is, per capita, nearly 16 times greater than the non-Indian rate. In the State of Washington, the Indian adoption rate is 19 times greater and the foster care rate 10 times greater. In Wisconsin, the risk run by Indian children of being separated from their parents is nearly 1600 percent greater than it is for non-Indian children.

Id.

7. Wendy Therese Parnell, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L. REV. 381, 382 (1997).

8. George, *supra* note 6, at 165.

removal of Indian children and assimilation into the predominantly white culture.⁹

During the Boarding and Mission School Era, the goal was to solve the “Indian problem” through the removal of Indian children from their homes and placing them in government boarding schools and Christian mission schools.¹⁰ Indians were regarded as “savages,” and their culture and religion were thought of as immoral, inferior and contemptible.¹¹ In order to assimilate Indian children into the non-Indian culture, boarding school children were placed in non-Indian homes during “outings,” which extended beyond the normal school year into summer vacations and holidays.¹²

In addition, discipline in the boarding schools was strict, and punishment was inflicted upon those children who violated the rules.¹³ The Indian children who lived at the boarding schools were torn from their families, tribes, norms, beliefs, language, religion and ultimately, their sense of selves and identities.¹⁴

Boarding schools began closing in the mid-1930s with the passage of the Indian Reorganization Act, and reservation day schools began to replace the boarding and mission schools.¹⁵ During the 1950s and 1960s, some boarding schools continued to exist, but

9. *Id.*

10. *Id.* at 166.

11. *Id.* In 1886, the Commissioner of Indian Affairs stated,

It is admitted by most people that the adult savage is not susceptible to the influence of civilization, and we must therefore turn to his children, that they might be taught to abandon the pathway of barbarism and walk with a sure step along the pleasant highway of Christian civilization They must be withdrawn, in tender years, entirely from the camp and taught to eat, to sleep, to dress, to play, to work, to think after the manner of the white man.

Id.; see also Jennifer Nutt Carleton & Peggy A. Schneider, *ICWA Proceedings in State Court – Educating the Participants and Preserving the Tribe’s Interest in its Indian Children* 6, presented at the National Indian Child Welfare Association Conference (April 23–25, 2001).

On many reservations it was once enough for caseworkers to decide arbitrarily that a family was too poor to raise a child. It was overlooked that in tribal cultures the amount of care given a child often went well beyond one household. The full social and blood-tie network of parents, grandparents, relatives and neighbors was a wealth not categorized on a caseworker’s clipboard of acceptable standards for child-raising.

Id.

12. George, *supra* note 6, at 166.

13. *Id.* at 167 (indicating that the rules included speaking only English, wearing a uniform, never questioning authority, maintaining silence unless called upon and working hard).

14. *Id.*

15. *Id.*

they functioned as residential facilities for the abused and neglected and not as educational institutions.¹⁶

With the closing of the boarding schools, the Bureau of Indian Affairs (“BIA”) became concerned about the number of Indian children who would be returned to their communities and a “life of poverty” if alternative placements were not found.¹⁷ As a result, the BIA hired social workers to place Indian children in non-Native homes.¹⁸ The BIA subsequently contracted with the Child Welfare League of America (“CWLA”) in 1957 “to operate a clearinghouse for the interstate placement of Indian children with non-Indian families.”¹⁹ The venture became known as the “Indian Adoption Project.”²⁰

The Indian Adoption Project’s mission was clear: to place Indian children with Caucasian families far from the reservation.²¹ The removal and adoption of the Indian children was justified by the CWLA as acting in the “best interests of the children,” as the poverty of Indian family life was recognized as a factor leading to neglect and abuse.²²

Tribes opposed the removal of their children and instead believed that Indian children had the right to live within their tribal culture with Indian parents or caregivers.²³ Tribes understood that two relational systems existed within tribal culture: the biological family and the kinship network.²⁴ Both systems were very important to the identity, emotional and psychological well-being of the

16. *Id.*

17. *Id.* at 169.

18. *Id.*

19. *Id.* The Child Welfare League of America’s philosophy was that the “forgotten child, left unloved and uncared for on the reservation, without a home or parents he can call his own” could be adopted “where there was less prejudice against Indians.” *Id.* Those in eastern states were thought to be less prejudiced. *Id.*

20. *Id.*

21. *Id.* A total of 395 Indian children were adopted for placement in white families, with 96% of this total number of children placed in Midwestern and Eastern states.

22. *Id.* at 170.

The Native American family ranked on the lowest rung of any social welfare ladder, while the Caucasian middle-class family held a valued position in society, supported by the economic-ideological philosophy of assimilation: the conscience of the adoption system was cloaked in the Christian zeal of “saving God’s forgotten children” and economically supported by assimilationist policy.

Id.

23. *Id.*

24. *Id.*

Indian child because it was within these two systems that the child formed his definition of self as Indian.²⁵ Tribal members believed it was in the Indian child's and tribe's best interests for the child to develop his identity within this tribal network.²⁶

The "success" of the CWLA's Adoption Project came to light when the United States Senate began conducting subcommittee hearings in the 1970s on Indian child welfare issues.²⁷ For example, Congress discovered that in Minnesota during 1971 to 1972, nearly one in four Indian infants under the age of one year were adopted and ninety percent of those adoptions were by non-Natives.²⁸ Statistics such as these and bitter testimony²⁹ from Native leaders, parents and relatives led to the enactment of the ICWA in 1978.³⁰

The ICWA provides important protections for Indian tribes, children, parents and extended families in foster care and in state court proceedings for the termination of parental rights.³¹ For ex-

25. *Id.*; see also NATIONAL INDIAN CHILD WELFARE ASSOCIATION, INC., SPLIT FEATHERS: ADULT AMERICAN INDIANS WHO WERE PLACED IN NON-INDIAN FAMILIES AS CHILDREN 1 (Jan. 1999), at <http://nicwa.org/pathways/page15.htm>. The study described the "Split Feather Syndrome," defined as a pervasive pattern of emotional suffering by an increasing number of American Indian adults, all of whom had been adopted or placed in foster care in non-Native placements. The term "Split Feather" refers to adult Indians who were removed from their homes and cultures as children and placed in non-Indian homes through foster care or adoption.

26. George, *supra* note 6, at 170; see also Sloan Philips, *The Indian Child Welfare Act in the Face of Extinction*, 21 AM. INDIAN L. REV. 351, 360 (1997). According to testimony from Dr. Joseph Westermeyer, a University of Minnesota social psychiatrist, at congressional hearings in 1974 regarding Indian child welfare programs,

[w]hen Indian children are raised in a white culture and given a white identity, society does not grant these children a white identity. Parents of white children did not want their children dating Indian children and Indian children found that "society was putting on them an identity which they didn't possess and taking from them an identity that they did possess."

Id. (citations omitted).

27. George, *supra* note 6, at 172.

28. *Id.* at 173.

29. *Id.*; see also Parnell, *supra* note 7, at 382 ("Tribal leaders feared that if they lost their next generation of tribal members, their cultural traditions would inevitably die.").

30. George, *supra* note 6, at 173.

31. 25 U.S.C. § 1902 (1994). The statute states that

[t]he Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families

ample, the Act provides that the Indian child's tribe shall have the right to intervene in state court foster care or parental termination proceedings.³² Tribes are also entitled to notice by registered mail of any involuntary foster care or termination proceeding in state court involving the Indian child.³³ Parents or the Indian custodians of the Indian child are entitled to a court-appointed attorney if they are indigent.³⁴ The Act also provides important foster care and adoptive placement preferences, with the top preference being with a member of the child's extended family.³⁵ The ICWA also holds the State to the higher standard of making "active efforts" to provide remedial services and rehabilitative programs to the Indian family.³⁶ Finally, for child welfare proceedings, the Act affords tribes exclusive jurisdiction and transfer jurisdiction from state court.³⁷

and the placement of such children in foster or adoptive homes[,] which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs

Id.; see also Donna J. Goldsmith, *Individual vs. Collective Rights: The Indian Child Welfare Act*, 13 HARV. WOMEN'S L.J. 1, 3 (1990).

32. 25 U.S.C. § 1911(c) (1994).

33. *Id.* § 1912(a).

34. *Id.* § 1912(b).

35. *Id.* § 1915. This section states:

(a) In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with – (i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

36. *Id.* § 1912(d). This section states:

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

37. *Id.* §§ 1911(a) and (b).

III. THE ADOPTION AND SAFE FAMILIES ACT OF 1997

*It will be important for tribes to become proactive in state court proceedings if they want to maximize their impact on decisions pertaining to their children and families. State systems will be under enhanced pressure to achieve permanent placements quickly. If tribes take a "wait and see" stance toward state court cases, they may find that crucial decisions have been made without their involvement that will be difficult to reverse.*³⁸

On November 19, 1997, President Clinton signed federal legislation called the Adoption and Safe Families Act ("ASFA").³⁹ The law was the first broad-based child welfare reform legislation since the Adoption Assistance and Child Welfare Act of 1980 ("AACWA") was passed.⁴⁰ The legislation was a shift in federal policy giving priority to the needs of the child rather than to the needs of the family.⁴¹ "The big thing this bill does is swing the pendulum of government concern back in the direction of the children," said U.S. Representative E. Clay Shaw Jr., (R-Fla.), chairman of the U.S. House Human Resources Subcommittee.⁴²

The new law was the congressional response to suggestions that the AACWA had resulted in children languishing in foster care too long or moving repeatedly without finding a permanent home.⁴³ The AACWA introduced the concepts of "permanency

38. DAVID SIMMONS & JACK TROPE, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, INC. (NICWA), P.L. 105-89, ADOPTION AND SAFE FAMILIES ACT OF 1997 24 (1999).

39. 1997 CONG. Q. ALMANAC 6-36; Pub. L. No. 105-89, 111 Stat. 2115 (1997).

40. Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4020 (Jan. 25, 2000); Pub. L. No. 96-272, 94 Stat. 500 (1980).

41. 1997 CONG. Q. ALMANAC 6-36; *see also* Kathleen A. Bailie, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2286 (1998):

Rather than working to help families stay together or reunite after being separated, this new law directs child welfare agencies to focus primarily on "the child's health and safety," not on the family as a whole. While this may sound like a laudable goal, this new philosophy may serve to hurt families in poverty who are often the targets of neglect allegations and who may simply need supportive services from the state to help them care for their children.

42. 1997 CONG. Q. ALMANAC 6-37.

43. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 Rule 12.4(d) (codified in scattered sections of 42 U.S.C.) (amended 1997); *see also* Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4020 (Jan. 25, 2000); SIMMONS &

planning” and “foster care drift.” Permanency planning, the idea that children should be placed in stable housing with a continuity of caregivers, was needed to solve the problem of children “stuck” in foster care for extended periods of time.⁴⁴

The AACWA also required states to make “reasonable efforts” to reunite a child with his or her family before allowing a child to be adopted.⁴⁵ These “reasonable efforts” were also required in order for the state to qualify for federal funding.⁴⁶ During the debate in the U.S. Senate before the bill was passed, the term “reasonable efforts” was discussed:

Too often, reasonable efforts, as outlined in the statute,⁴⁷ have come to mean unreasonable efforts. It has come to mean efforts to reunite families which are families in name only. I am speaking now of dangerous, abusive adults who represent a threat to the health and safety and even the lives of these children. This law has been misinterpreted in such a way that no matter what the particular circumstances of a household may be, it is argued that the State must make reasonable efforts to keep that family together and to put it back together if it falls apart Clearly, the Congress of the United States in 1980 did not intend that children should be forced back into the custody of adults who are known to be dangerous and known to be abusive.⁴⁸

To respond to these concerns, the ASFA shortened the time frame for conducting permanency hearings. The 1997 law created a new requirement for states to make reasonable efforts to finalize

TROPE, *supra* note 38, at 5; Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 424 (1983).

The problem that the permanency program seeks to resolve is now generally described as “foster care drift.” Drift occurs when children in placement lose contact with their natural parents and fail to form any significant relationship with a parental substitute. . . . Once a child enters foster care, he has about a 50% chance of remaining there for at least two years; the longer he remains in care, the more likely he is to lose contact with his natural parents and to change foster homes.

Id. at 426.

44. See Cheryl A. DeMichele, *The Illinois Adoption Act: Should A Child's Length of Time in Foster Care Measure Parental Unfitness?*, 30 LOY. U. CHI. L.J. 727, 738-39 (1999); see also HENRY S. MAAS & RICHARD E. ENGLER, JR., CHILDREN IN NEED OF PARENTS (1959) (explaining “foster care drift”); Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 644 (1999).

45. 1997 CONG. Q. ALMANAC 6-36.

46. 42 U.S.C. § 671(a)(15) (1994).

47. See Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980).

48. 143 CONG. REC. S12669 (1997) (Comments of Sen. DeWine).

a permanent placement and established tight time frames for filing petitions to terminate parental rights.⁴⁹

ASFA required states to file petitions for termination once a child had been in foster care for fifteen out of the last twenty-two months (subject to certain exceptions).⁵⁰ This provision was intended to expedite efforts to place children in permanent placements.⁵¹ The consequence of the provision was that it created greater hesitation on the part of states to engage in lengthy reunification efforts.⁵² Obviously, the “fifteen out of twenty-two months”

49. Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4020, 4020-21 (Jan. 25, 2000).

50. ASFA § 103(c)(1)(A), 111 Stat. 2115, 2119 (current version at 42 U.S.C. 675 (1994)); *see also* SIMMONS & TROPE, *supra* note 38, at 3. In fact, the law re-authorizes funding under Title IV-B, Subpart 2, of the Social Security Act, and has added two new categories of eligible services entitled “Time-Limited Family Reunification Services” and “Adoption Promotion and Support Services.” *Id.* at 5. The time-limited reunification services can be provided with these funds, though for only 15 months from the time a child has entered foster care. *Id.*

51. SIMMONS & TROPE, *supra* note 38, at 10.

52. *Id.* In fact, Alaska’s recently doubled adoption statistics prove this has occurred in Alaska. Alaska Department of Health and Social Services, Division of Family and Youth Services (“DFYS”), PROBER statistics [hereinafter “PROBER”], Children Adopted from DFYS Custody, FFY [Federal Fiscal Year] 1995-FFY 2001 (July 23, 2001). The PROBER statistics are based on a federal fiscal year running from October 1 through September 30. The PROBER database system collects and manages Alaska’s child welfare information. Interviews with MaryAnn VandeCastle, DFYS research analyst (July 18, 2001 and July 23, 2001). The system is now outdated as it does not allow for the gathering, breakdown, or matching of all of the different types of foster care and adoption statistics needed for reporting to the federal government in light of new ASFA requirements. *Id.* The State is in the process of acquiring and putting in place a more advanced “case management child welfare information system,” called Online Resources for the Children of Alaska (ORCA). *See* ORCA Information, *available at* <http://www.hss.state.ak.us/dfys/ORCA/ORCA.htm> (*last visited* Jan. 31, 2002). The process to set up the new ORCA database system could take at least several more years, since a Request for Proposal to purchase a professional services contractor to conduct a business process review was issued only on April 25, 2001. *Id.* In the meantime, the state continues to be in noncompliance with the federal government’s requirements regarding the gathering of child welfare information and incurs heavy annual monetary penalties. *Id.*; *see also* 143 CONG. REC. S12668, 12672 (daily ed. Nov. 13, 1997) (statement of Sen. Grassley):

One of the problems we as legislators have experienced has been that inadequate statistics are kept; we don’t have good enough statistics to understand how States are performing with their child care system. The data is too sparse and States can’t tell us how many children they actually have in their care, or how long they have been there So our bill is requiring States to report critical statistics. Children will be identified

deadline created additional pressure on states to limit reunification and rehabilitative services.⁵³

The ASFA also gave “adoption incentive payments” to states for each foster care child that was adopted.⁵⁴ States were scheduled to receive \$4,000 for each adoption of a foster care child that exceeded its previous annual level.⁵⁵ The figure rose to \$6,000 for each child with disabilities that was adopted.⁵⁶

Congress set the total payments for the incentive adoptions at \$20 million a year, for five years, beginning in fiscal year 1999.⁵⁷ Some persons estimated this money would pay for only four thousand more adoptions nationwide.⁵⁸ These bonuses were in addition to existing foster care funds already in place for states.⁵⁹ According to the Congressional Budget Office, the incentive adoption expenditures would cost nothing to the government, or might even result in savings, because more adoptions would mean less spent on expensive foster care.⁶⁰

and their lives will be personalized to those responsible to them. The status quo will not be able to hide behind the lack of information excuse.

Id.

53. SIMMONS & TROPE, *supra* note 38, at 11.

54. *Id.* at 5; ASFA § 201(a); *see also* 143 CONG. REC. S12671 (1997) (statement of Sen. Rockefeller: “[T]he act encourages adoptions by rewarding States that increase adoptions with bonuses for foster care and special needs children who are placed in adoptive homes.”).

55. SIMMONS & TROPE, *supra* note 38, at 5.

56. *Id.*

57. 1997 CONG. Q. ALMANAC 6-36; ASFA § 201(a).

58. *See* DeMichele, *supra* note 44, at 757.

59. *Id.*

60. *Id.*; *see also* 143 CONG. REC. S12674 (daily ed. Nov. 13, 1997) (statement of Sen. Domenici):

[T]he bill [ASFA] provides more funds to reward states that increase adoptions. These adoptions will preclude children from having long, or even worse, permanent stays in state foster care systems. To achieve this additional funding, the bill contains a discretionary spending cap adjustment of \$20 million per year for the years 1999 to 2002. One could argue that this cap adjustment would result in an increase in the deficit. However, the Congressional Budget Office estimates that spending from this incentive payment will reduce mandatory foster care spending by \$25 million over the next five years.

Id. In Alaska, foster care is more expensive to the state than guardianship or adoptions. DEPARTMENT OF HEALTH AND SOCIAL SERVICES, FINDING HOME, 2001 BALLOON PROJECT REPORT 18 (2001) [hereinafter “BALLOON PROJECT REPORT 2001”]. State foster care costs approximately \$34.08 per day, while subsidized adoption or guardianship costs only \$17.75 per day. *Id.*

The ASFA is mostly silent regarding the ICWA and Indian tribes.⁶¹ Section 202(a) adds a subsection to 42 U.S.C. section 622(b), requiring states to adopt a plan for child welfare services to be eligible for federal payment.⁶² An approved plan must contain a description, developed after consultation with tribal organizations in the state, of the specific measures taken by the State to comply with the ICWA.⁶³ This reference shows Congress was aware of the ICWA and chose not to delete this provision requiring compliance with it.⁶⁴

Further guidance on whether the ASFA or any part of it was intended to preempt the ICWA is found in a final rule published by the Administration on Children, Youth and Families on January 25, 2000.⁶⁵ The rule amended existing federal regulations by adding new requirements regarding the ASFA, states' conformity with state plans under Titles VI-B and IV-E of the Social Security Act, and other provisions.⁶⁶ The rule clearly stated that ASFA's requirements do not supersede or preempt the ICWA.⁶⁷

In addition, the rule stated that no group of children may be exempted from the requirement for states to file a petition to terminate parental rights.⁶⁸ More specifically, the rule notes that:

61. CRAIG J. DORSAY, *THE INDIAN CHILD WELFARE ACT AND THE ADOPTION AND SAFE FAMILIES ACT 3* (2000).

62. *Id.*

63. *Id.* This issue is beyond the scope of this Article, but it would be interesting to examine Alaska's current plan for child welfare services and the State's process for formalizing it.

64. *Id.*

65. Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4020 (Jan. 25, 2000) (to be codified at 45 C.F.R. pts. 1355-57).

66. *Id.*

67. *Id.* at 4029.

Some commenters also requested that we explain how the requirements of the Indian Child Welfare Act work in context of the ASFA. Although we can affirm that States must comply with ICWA and that nothing in this regulations supercedes ICWA requirements, we cannot expound on ICWA requirements since they fall outside our statutory authority.

Id.

68. *Id.*

Several issues of note recurred as themes throughout the comments and the regulation. One was the application of the rules to certain populations, such as Indian tribal children We clarify how in particular the provisions of the final rule apply to these populations of children, but also emphasize that overall the statute must apply to these children as they {sic} would any other child in foster care. We have no statutory authority to exempt any group from provisions such as the safety requirements or termination of parental rights requirements. Further-

[m]any commenters sought exemptions for specific populations from the requirement for [the] State to file or join TPR [termination of parental rights] petitions for certain children who have been in foster care for 15 out of the most recent 22 months, abandoned infants, or children of parents who have committed certain felonies. Several commenters noted that many tribal cultures and traditions do not recognize the concepts of terminating parental rights and adoption, and requested a specific exemption from the application of the provision to tribes. . . . We have no statutory authority to provide an exemption for particular populations from the requirement to file a TPR for certain children. . . . Congress developed the TPR provision to be applied to all children in foster care, whatever their entry point into the system.⁶⁹

The rule also addressed questions regarding how the termination of parental rights requirement applied to Indian tribes and the relationship to ICWA requirements:

The Indian Child Welfare Act of 1978 (ICWA), Public Law 95-608, was passed in response to concerns about the large number of Indian children who were being removed from their families and tribes and the failure of States to recognize the culture and tribal relations of Indian people. ICWA, in part, creates procedural protections and imposes substantive standards on the removal, placement, termination of parental rights and consent to adoption of children who are members of or are eligible for membership in an Indian tribe. The addition of the requirement in section 475(5)(E) of the Act to file a petition for TPR for certain children in no way diminishes the requirements of ICWA for the State to protect the best interests of Indian children. Furthermore, States are required to comply with the ICWA requirements and develop plans that specify how they will comply with ICWA in section 422(b)(11) of the Act.⁷⁰

Finally, Congress stated that if states did not comply with the provisions of the ASFA, they would be penalized:

The Federal Government plays a significant role in child welfare by providing funds to States and attaching conditions to those funds. The single largest category of Federal expenditure under the child welfare programs is for maintaining low income foster care children. To receive Federal funds, States must comply with the requirements of this bill, and States will be penalized for noncompliance. We are sick and tired of kids being kept in the foster care system because there is money that comes from the

more, we strongly believe that, while these requirements must apply to all children, the statute affords the State agency the flexibility to engage in appropriate individual case planning.

Id.

69. *Id.* at 4059.

70. *Id.*

Federal Government for those kids. There is an incentive, a monetary incentive, not to move these children toward permanency.⁷¹

IV. ACCELERATED TERMINATION OF ALASKA NATIVE PARENTAL RIGHTS: IS IT IN THE BEST INTERESTS OF THE INDIAN CHILD?

*Existing international law and existing national law do not adequately protect us against the serious threats to our existence. Our cultures, our religions, our governments and our ways of life are all in danger. We are not simply individuals with individual groups. We are a people, not simply individuals. For these reasons we face unique problems. Special measures are required to meet these problems. If these measures are not taken, more and more indigenous people may be destroyed, their cultures vanished forever.*⁷²

A. State Statistics after Passage of the New CINA Statutes

After the new CINA statutes were passed in 1998, the number of statewide parental rights termination proceedings has more than doubled, and the number of terminations has increased dramatically: 151 parental rights terminations in 1997; 210 in 1998; 260 in 1999; and 564 in 2000.⁷³

Under these new CINA provisions, the State must permanently terminate parental rights before a child is placed for adoption.⁷⁴ The number of Alaskan children adopted from state foster care has also more than doubled since 1998.⁷⁵ In 1995, 103 children in foster care were adopted from state protective custody.⁷⁶ From

71. 143 CONG. REC. S12668, S12672-73 (daily ed. Nov. 13, 1997) (statement of Sen. Grassley).

72. Lynn Klicker Uthe, *The Best Interests of Indian Children in Minnesota*, 17 AM. INDIAN L. REV. 237 (1992) (quoting Chief Jake Swamp of the Mohawk Nation, Address to the United Nations Commission on Human Rights (May 7, 1982) (supporting the establishment, in 1982, of a working group to focus on indigenous populations, U.N. DOC. E/CN.4/sub.#2/1982/33#annex)).

73. PROBER, Estimated Number of Parental Rights Terminations, FY 1994 through FY 2001 (July 23, 2001).

74. ALASKA STAT. § 47.10.088 (Michie 2000). Or, more rarely, a parent may voluntarily relinquish his or her parental rights. See ALASKA STAT. § 25.23.180 (Michie 2000); ALASKA CHILD IN NEED OF AID CT. R. 18(d); 25 U.S.C. § 1913 (1994).

75. BALLOON PROJECT REPORT 2001, *supra* note 60, at 3; PROBER, Children Adopted from DFYS Custody, FFY 1995-FFY 2001 (July 23, 2001).

76. PROBER, Children Adopted from DFYS Custody, FFY 1995-FFY 2001 (July 23, 2001).

1996 through 1998, the numbers remained approximately the same: 112 children adopted in 1996; 109 in 1997; and 95 in 1998. After passage of the new laws in 1998, the number of adoptions jumped to 139 adoptions in 1999, 203 in 2000, and 220 in 2001.⁷⁷

No other group in Alaska has been more affected by the new CINA statutes than Alaska Natives. Even though Alaska Natives represent only seventeen percent of the total Alaska population, they are over-represented in Alaska's child protection system.⁷⁸ State statistics show that as of October 2000, forty-five percent of the children who were the subjects of reports of harm in the child protective system were Native.⁷⁹ As of July 5, 2001, 1,125 Native children were in out-of-home state foster care.⁸⁰

State statistics illustrate another consequence of the new laws: the number of adoptive homes for children does not appear to have kept pace with the increase in terminations of parental rights. This in turn, has created a "cadre of legal orphans" – children legally severed from their natural parents without an adoptive home.⁸¹ State statistics show that the rate of termination currently exceeds the rate of adoption in Alaska. In July 2001, approximately 347 children were in out-of-home care, where both parents' rights had been terminated.⁸² In federal fiscal year ("FFY") 2000 (from October 1 through September 30), a total of 203 children were adopted

77. *Id.* The statistics for 2001 are an estimate based on figures for the first half of the year.

78. BALLOON PROJECT REPORT 2001, *supra* note 60, at 18. The 2000 Census showed a total Alaska population of 626,932 persons, which included 98,043 Alaska Natives. 2000 Census, *available at* <http://www.labor.state.ak.us/research/col/perapinc.pdf>; <http://146.6375/census2000>.

79. BALLOON PROJECT REPORT 2001, *supra* note 60, at 18.

80. PROBER, Native Children in Family Services Custody and Out-of-Home Care By Region, Office, and ICWA Preference Level as of July 5, 2001 (does not include children in custody in their own home). The foster care population in the U.S. has increased from approximately 276,000 in 1985 to 468,000 in 1995. Patti Flanagan, Ph.D., MSW, Presentation at the National Indian Child Welfare Association Conference (April 23-25, 2001). The number and percentage of Indian children in this population also has risen. *Id.* In 1996, the Association on American Indian Affairs found that 25 to 35 percent of all Indian children were being removed from their homes, and that an estimated 6,500 ended up in out-of-home placement yearly. *Id.*

81. *See* DeMichele, *supra* note 44, at 737 n.89 (1999) (discussing foster care in Cook County, Illinois).

82. PROBER, Children in Out of Home Care with Both Parents Rights Terminated, Jan. 1996 – July 2001 (July 23, 2001).

from the State Department of Health and Social Services' custody.⁸³ In FFY 2001, a total of 220 children were adopted.⁸⁴

B. The New CINA Statutes and Their Impact on Alaska Natives

The process of terminating parental rights begins when the child is removed from the parental home and placed in the custody of the State. Removal of the child triggers a period during which the parent may attempt to resolve the problems that caused the child to be taken from the parent's custody. To that end, a case plan for the parent to follow is developed. If, during this period, the parent is able to demonstrate that he or she is or has become a fit parent, the child is returned to the home. If the parent is unable to make this showing, proceedings to terminate parental rights will begin. During the waiting period before termination, the State must make "reasonable efforts" to assist the parent in meeting the requirements of the case plan; if the State fails to make such reasonable efforts, the "unfitness clock" stops running until such time as reasonable efforts have been provided.

The ICWA was intended to provide special protections for Indian children. For example, although the basic procedural steps under the ICWA leading up to a petition to terminate parental rights are similar to those discussed above, because the child is Indian, the State must go beyond "reasonable" efforts to make "active efforts" to assist the parent in fulfilling his or her case plan and regaining custody.

Despite the goals of the ICWA, the new CINA statutes dramatically cut the time Alaska Native parents have to "prove" to the State that they are fit parents before they can get their children back.⁸⁵ One of the new statutes uses the length of time the child has been in state foster care as a ground for parental unfitness.⁸⁶ If a child has been in foster care for at least fifteen of the most recent twenty-two months, the State is required to file a petition for termination of parental rights,⁸⁷ although the petition may be fore-stalled for a "compelling reason." Such compelling reasons for

83. PROBER, *Children Adopted from DFYS Custody, FFY 1995 – FFY 2001*. The 2001 statistics were based on an estimate for the first half of the year.

84. *Id.*

85. The State has the burden of proving that a parent's rights should be terminated. *See* ALASKA STAT. § 47.10.088 (Michie 2000) and 25 U.S.C. § 1912(f) (1994). However, to many Alaska Native parents facing seemingly insurmountable hurdles imposed by department case plans in getting their children back, the burden of proof often appears to fall on them.

86. ALASKA STAT. § 47.10.088(d) (Michie 2000).

87. *Id.* § 47.10.088(d)-(e).

forestalling the petition may include circumstances in which the child is being cared for by a relative or circumstances in which the State has not made reasonable efforts (consistent with the time period in the Department's case plan) to provide the family support services that the Department has determined are necessary for the safe return of the child to the home.⁸⁸ Even though a parent might satisfactorily complete the requirements of his or her case plan if he or she were given twenty-four months during which the child was in state custody, the lack of sufficient time to fulfill the requirements of a case plan is not likely to be a "compelling reason" to stop the State from filing a petition to terminate.

The new CINA laws are also disturbing because they do not mention the additional findings that a court must make in welfare proceedings where the child is Indian. Instead, the new laws are silent regarding the higher federal standards that must be afforded to Indian children and parents under the ICWA. For example, the CINA statutes require only that the State make "reasonable efforts" to provide family support services to the child and parents.⁸⁹ The ICWA instead requires the State to make "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and to show that these efforts have proved unsuccessful.⁹⁰ In addition, under the CINA statutes, the State is not required to provide any family support services to the Native family if the court finds by a preponderance

88. *Id.* There is no further guidance under state law for the definition of "compelling reason," but federal guidance is found under the regulations applicable to ASFA:

Compelling reasons for not filing a petition to terminate parental rights include, but are not limited to: (A) Adoption is not the appropriate permanency goal for the child; or, (B) No grounds to file a petition to terminate parental rights exist; or, (C) The child is an unaccompanied refugee minor as defined in 45 CFR 400.111; or (D) There are international legal obligations or compelling foreign policy reasons that would preclude terminating parental rights; or (E) The State agency has not provided to the family, consistent with the time period in the case plan, services that the State deems necessary for the safe return of the child to the home, when reasonable efforts to reunify the family are required.

45 C.F.R. § 1356.21(i)(2)(ii) (2000).

89. ALASKA STAT. § 47.10.086 (Michie 2000):

(a) except as provided in (b) and (c) of this section, the department shall make timely, reasonable efforts to provide family support services to the child and to the parents or guardian of the child that are designed to prevent out-of-home placement of the child or to enable the safe return of the child to the family home, when appropriate, if the child is in an out-of-home placement.

90. 25 U.S.C. § 1912(d) (1994).

of the evidence that one of the exceptions listed in Alaska Statute sections 47.10.086(c)(1) through (10) is applicable.⁹¹

When the State Department of Health and Social Services has failed to make reasonable efforts, the new laws do appear to provide some protection to parents by barring the termination of pa-

91. Under Alaska Statute section 47.10.086(c):

[t]he court may determine that reasonable efforts of the type described in (a) of this section are not required if the court has found by a preponderance of the evidence that (1) the parent or guardian has subjected the child to circumstances that pose a substantial risk to the child's health or safety; these circumstances include abandonment, sexual abuse, torture, chronic mental injury, or chronic physical harm; (2) the parent or guardian has (A) committed homicide under AS 11.41.100–11.41.130 of a parent of the child or of a child; (B) aided or abetted, attempted, conspired, or solicited under AS 11.16 or AS 11.31 to commit a homicide described in (A) of this paragraph; (C) committed an assault that is a felony under AS 11.41.200–11.41.220 and results in serious physical injury to a child; or (D) committed the conduct described in (A)–(C) of this paragraph that violated a law or ordinance of another jurisdiction having elements similar to an offense described in (A)–(C) of this paragraph; (3) the parent or guardian has, during the 12 months preceding the permanency hearing, failed to comply with a court order to participate in family support services; (4) the department has conducted a reasonably diligent search over a time period of at least three months for an unidentified or absent parent and has failed to identify and locate the parent; (5) the parent or guardian is the sole caregiver of the child and the parent or guardian has a mental illness or mental deficiency of such nature and duration that, according to the statement of a psychologist or physician, the parent or guardian will be incapable of caring for the child without placing the child at substantial risk of physical or mental injury even if the department were to provide family support services to the parent or guardian for 12 months; (6) the parent or guardian has previously been convicted of a crime involving a child in this state or in another jurisdiction and, after the conviction, the child was returned to the custody of the parent or guardian and later removed because of an additional substantiated report of physical or sexual abuse by the parent or guardian; (7) a child has suffered substantial physical harm as the result of abusive or neglectful conduct by the parent or guardian or by a person known by the parent or guardian and the parent or guardian knew or reasonably should have known that the person was abusing the child; (8) the parental rights of the parent have been terminated with respect to another child because of child abuse or neglect, the parent has not remedied the conditions or conduct that led to the termination of parental rights, and the parent has demonstrated an inability to protect the child from substantial harm or the risk of substantial harm; (9) the child has been removed from the child's home on at least two previous occasions, family support services were offered or provided to the parent or guardian at those times, and the parent or guardian has demonstrated an inability to protect the child from substantial harm or the risk of substantial harm; or (10) the parent or guardian is incarcerated and is unavailable to care for the child during a significant period of the child's minority, considering the child's age and need for care by an adult.

rental rights;⁹² however this protection is illusory. It is easy to predict that the fifteen-month timeline to terminate comes up quickly for many parents without reasonable or active efforts having been provided by the State.⁹³ Departmental delays, in providing services and programs that would enable parents to comply with the requirements in their case plans are common. Delays occur because the services and programs offered by the State take time (perhaps months) to establish. Furthermore, delays may occur in referring parents to programs in obtaining appointments for parents with counselors, doctors or psychologists; in obtaining entrance into a substance abuse program; or in appointing a secondary social worker if a parent has moved to a different community for better services and programs.⁹⁴ Additionally, the State may change or add requirements to a parent's case plan over time.

The complex factors involved in treating drug and alcohol addicted parents and the likelihood of relapse lessens the chance of resolving a parent's substance abuse problem within the short time allotted under the termination statute.⁹⁵ If parental substance abuse is involved, the amount of time it takes for a parent to complete a treatment program and then remain sufficiently "sober" in the eyes of the State may easily take more than one year.⁹⁶ The

92. Alaska Statute section 47.10.088(e)(2) provides that

[i]f one of more of the conditions listed in (d) of this section are present, the department shall petition for termination of the parental rights to a child unless the department . . . (2) is required to make reasonable efforts under AS 47.10.086 and the department has not provided to the parent, consistent with the time period in the department's case plan, the family support services that the department has determined are necessary for the safe return of the child to the home.

93. Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4020, 4057 (Jan. 25, 2000) (to be codified at 45 C.F.R. pts. 1355, 1356 and 1357). The regulation states:

We do not have the authority to waive time frames for case review requirements because the law requires that States hold court hearings and periodic reviews within very specific time frames. We believe that States must be held accountable to these statutory time frames, and therefore, offer no changes to the case review system. A major goal of ASFA was to tighten case review time frames to prevent children from experiencing extended stays in foster care.

Id.

94. See DeMichele, *supra* note 44, at 758.

95. *Parental Substance Abuse—Implications for Children, the Child Welfare System, and the Foster Outcomes Testimony Before the Subcomm. on Human Res. of the House Comm. on Ways and Means*, 105th Cong. 8-9 (1997).

96. See DEMICHELE, *supra* note 44 at 760. See also *Parental Substance Abuse—Implications for Children, the Child Welfare System, and the Foster Outcomes Testimony Before the Subcomm. on Human Res. of the House Comm. on Ways and*

lack of drug treatment programs and counseling in a parent's community may also add to the delay in obtaining treatment.⁹⁷ This is particularly a problem in small rural communities in Alaska where these programs are not readily available.

Most Alaska Native parents are unlikely to know about this exception that stops the "unfitness clock" from tolling if the State has not made reasonable efforts, and therefore the parents will not raise the issue themselves before the court.⁹⁸ If the issue is raised at all, it may be so late in the proceedings that it is unlikely to influence the outcome.⁹⁹

The new CINA laws make it easier to terminate the rights of parents in order to "free" the child for adoption. This has negative consequences for Alaska Native children in closed adoptions¹⁰⁰ in that the child not only loses contact with his natural parents, but also loses the right to have contact with his Native grandparents

Means, 105th Cong. 2 (1997) (statement of Jane L. Ross, Director of Income Security Issues, Health, Education, and Human Services Division, indicating that when foster cases involve parental abuse, it is harder to reconcile making permanency decisions in shorter time periods with making reasonable efforts to reunite families); Wendy Chavkin et al., *Drug-Using Families and Child Protection: Results of a Study and Implications for Change*, 54 U. PITT. L. REV. 295, 296 (1992).

97. See DeMichele, *supra* note 44, at 760.

98. Compare DeMichele, *supra* note 44, at 759-60.

99. It is also unlikely that a parent's court-appointed attorney will raise this issue if raising it will involve extensive time and resources. See generally Barbara Allan Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 182, 184 (1983-84); Bailie, *supra* note 41, at 2304-16. Court-appointed attorneys usually have extremely high caseloads, work for understaffed offices, are frequently underpaid, and often do not have the time or resources to engage in extensive motion or appellate practice for their clients. *Id.* In most CINA cases, Alaska Native parents qualify for and are appointed an assistant public defender or other court-appointed representation. Neal Fried, *Employment Numbers Looking Better in 2000*, ALASKA EMPLOYMENT SCENE, Exhibit 6 (on file with author). The average per capita income for Alaskans in 1998 was \$27,835. Many of the state's lowest per capita incomes are found in rural Alaska. *Id.* Areas where per capita income is 70% or less of the statewide average are all rural but one. *Id.* CHARLES HOREJSI, BONNIE HEAVY RUNNER CRAIG & JOE PABLO, REACTIONS BY NATIVE AMERICAN PARENTS TO CHILD PROTECTION AGENCIES: A LOOK AT CULTURAL AND COMMUNITY FACTORS 4 (1991).

100. In "closed" adoptions, the parents whose rights have been terminated have no legal parental rights remaining. They (the child's relatives and tribe) also have no rights to visitation or contact with the child. In contrast, under an "open" adoption, the parents, relatives and tribe may maintain the right to have contact with the child after the parents' rights are terminated. In Alaska, the State is frequently willing to negotiate open adoption agreements in voluntary parental relinquishment proceedings.

and other Native relatives.¹⁰¹ However, as the number of parental rights terminations outweighs the number of available adoptive homes, a Native foster child may find himself cut off from his biological family and relatives, but also have no permanent adoptive home available. All of the aforementioned outcomes directly conflict with the ICWA's definition of the best interests of the Indian child and the ICWA's goal of promoting the stability and security of Indian tribes and families.¹⁰²

C. Integration of ASFA with the Requirements of the ICWA

The absence of language in the ASFA governing how states and tribes can integrate its requirements with those of the ICWA has resulted in confusion.¹⁰³

Indian children have a unique political status not afforded other children as members of sovereign tribal governments. This political status, as well as the history of biased treatment of Indian children and families under public and private child welfare systems, is the basis for the Indian Child Welfare Act. However, ASFA did not specifically address how its provisions would interface with the Indian Child Welfare Act, principles of tribal sovereignty, jurisdictional or service delivery issues unique to Indian children.¹⁰⁴

Some tribal courts likely will be confused about whether the ICWA can be integrated with the ASFA and what laws must be applied in these tribal court proceedings.¹⁰⁵ The confusion found under the CINA statutes and the failure to impose additional findings in Indian child welfare cases is particularly troubling in

101. See generally DeMichele, *supra* note 44, at 757.

102. 25 U.S.C. § 1902 (1994). This section provides:

The Congress hereby declares that it is the policy of this Nation *to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families* by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.

Id. (emphasis added).

103. 25 U.S.C. §§ 1901-1963 (1994). Section 1921 of the ICWA provides:

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter [25 U.S.C. §§ 1911-1921] the State or Federal court shall apply the State or Federal standard.

104. SIMMONS & TROPE, *supra* note 38, at 1.

105. To what extent does the hodge-podge of state CINA laws, ASFA, ICWA, tribal law and state and federal restrictions governing social services funding to tribes govern tribal court child welfare proceedings? These issues pose interesting questions, but are beyond the scope of this article.

light of a remarkable line of cases recently issued by the Alaska Supreme Court that strengthen Alaska tribal court jurisdiction and tribal sovereignty.¹⁰⁶ These new cases support the expansion of Alaska tribal court authority in adjudicating Indian child welfare cases. The probable result of these recent court rulings is that Alaska tribal courts will begin to adjudicate more child welfare cases as original cases or as cases transferred to them by state courts.¹⁰⁷

V. IMPLEMENTATION OF ASFA AT THE STATE LEVEL

As stated previously, after passage of ASFA in 1997, the Alaska Legislature re-drafted the state CINA statutes to conform with ASFA's requirements.¹⁰⁸ The Alaska Supreme Court also amended its CINA Rules governing procedures in trial court in 1999 to conform with the changes under the 1998 statutes.¹⁰⁹ Unlike the CINA statutory scheme, the CINA Rules incorporated additional requirements set out under the ICWA for Indian children.¹¹⁰ This is confusing to some extent because the Rules specify

106. See *John v. Baker I*, 982 P.2d 738, 748, 749, 765 (Alaska 1999), *cert. denied*, 528 U.S. 1182 (2000) (holding that Alaska Native tribes are sovereign powers under federal law, that Public Law 280 does not apply to those Alaska Native tribes that do not occupy Indian country, and that the Native Village of Northway has jurisdiction to adjudicate child custody disputes involving tribal members, and remanded to the superior court to determine whether the tribal court's decision should be recognized under the comity doctrine); *John v. Baker II*, 30 P.3d 68 (Alaska 2001) (reversing superior court's decision to deny comity to the tribal court's order on grounds that the tribal court had not afforded due process to the father and remanded with instructions to refer to the Northway Tribal Court for new proceedings); *In re C.R.H.*, 29 P.3d 849 (Alaska 2001) (overruling *Native Village of Nenana v. State*, 722 P.2d 219 (Alaska 1986)).

107. The ICWA allows tribes to determine the best interests of their children. Philips, *supra* note 26, at 361. Tribal courts are in the best position to determine what is best for their children. *Id.*

Even though an Indian adoptee might live in a non-Indian home surrounded by loving parents, these same non-Indian adoptive parents more likely than not will fail to realize the devastating effects the interracial adoption will have on an adolescent Indian child. Furthermore, tribal courts are better equipped to deal with the unique cultural questions, customs, and social values to determine what is best for the child.

Id.

108. ALASKA STAT. §§ 47.10.005-.142, 47.10.300-.390, 47.10.392-.399 and 47.10.960-.990 (Michie 2000).

109. The CINA Rules were amended by Supreme Court Order (SCO) 1355 effective July 15, 1999.

110. ALASKA CT. CINA R. 2, 7, 10, 10.1, 15, 16, 17, 17.2, 18, 19, 19.1, 19.2, and 20.

additional duties for the Department of Health and Social Services that are not required under the state statute.

For example, Alaska Statutes section 47.10.086(a) requires the Department to make timely, reasonable efforts to provide family support services to the child and parents in all state CINA cases.¹¹¹ The statute does not require the Department to make “active” efforts.¹¹² Congress adopted the “active” efforts criterion in the ICWA because although most state laws required public or private agencies involved in child placements to resort to remedial measures prior to initiating placements or termination proceedings, these services were rarely provided.¹¹³ Under the active efforts standard, a higher burden of proof is placed on state agencies than under the predominately applied ‘reasonable efforts’ standards.¹¹⁴

Instead, only reasonable efforts as defined under the state statute are required in Alaska, and these efforts may be discontinued or not required in certain cases.¹¹⁵ Under the CINA Rules and under the ICWA, the Department is required to make “active” efforts to provide remedial services and rehabilitative programs in Indian child welfare cases.¹¹⁶ There is no provision under the ICWA or the state court rules for discontinuing or not requiring ac-

111. ALASKA STAT. § 47.10.086(a) (Michie 2000).

112. The Alaska Supreme Court has defined the “active” efforts required by the state as:

Passive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition. Active efforts, the intent of the drafters of the [ICWA], is where the state caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own. For instance, rather than requiring that a client find a job, acquire new housing, and terminate a relationship with what is perceived to be a boyfriend who is a bad influence, the Indian Child Welfare Act would require that the caseworker help the client develop job and parenting skills necessary to retain custody of her child.

A.M. v. State, 891 P.2d 815, 826 n.12 (Alaska 1995) (quoting CRAIG J. DORSAY, THE INDIAN CHILD WELFARE ACT AND LAWS AFFECTING INDIAN JUVENILES MANUAL 157, 158 (1984)).

113. Uthe, *supra* note 72, at 261 (citing H.R. REP. NO. 1386, *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531).

114. *Id.* (citing DEBRA RATTERMAN, REASONABLE EFFORTS, A MANUAL FOR JUDGES, NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION—A PROJECT OF THE ABA YOUNG LAWYER DIVISION 3 (1987)). It is interesting to note that Minnesota’s termination statute requires a showing of reasonable efforts, but additionally requires that the best interest standard for Indian children follow the ICWA, which calls for active efforts. *Id.* (citing MINN. STAT. ANN. § 260.221 (West Supp. 1991)).

115. ALASKA STAT. § 47.10.086(b) (Michie 2000).

116. ALASKA CT. CINA R. 10.1(b)(1)(B); *see also* Rule 18(c) (regarding termination of parental rights in cases involving Indian children).

tive efforts by the State in cases involving Indian children. This leads to the question whether a state trial court is permitted, under the ICWA, to determine that active efforts are not required in a case or that such efforts may be discontinued.¹¹⁷

This is only one example of an apparent conflict between the CINA statutes and the CINA Rules. The CINA Rules reflect some of the higher standards that must be applied in CINA proceedings involving Indian children. They also serve to explain the court procedures that should be followed in these proceedings. However, they do not solve certain questions, such as whether the Department is required to follow the provisions under the CINA statutes or the state court rules of procedure when the two sets of requirements conflict. In some cases, it may be possible for the department to follow both sets of requirements, but in other cases it may not be possible.

In order to implement the new CINA statutes at the state agency level, in 1999 the Alaska Legislature approved a two-year appropriation of \$1.6 million for the State's "permanency planning initiative."¹¹⁸ The "Balloon Project" was also initiated in 1999 as part of Governor Tony Knowles' Smart Start Initiative.¹¹⁹ This project created a state interagency working group and funded 20 full-time positions statewide whose jobs were dedicated to accelerating the placement of foster care children.¹²⁰ The staff was located in the Department of Health and Social Services, Division of Family and Youth Services, the Department of Law, the Office of Public Advocacy and the Alaska Court System.¹²¹

Also, the Alaska Supreme Court has issued many decisions applying the new and strict time frames for filing termination peti-

117. See ALASKA CT. CINA R. 17(c) and accompanying Note from the Alaska Supreme Court of June 1999.

118. Balloon Project Report 2001, *supra* note 60, at 7.

119. *Id.* at 2.

120. *Id.* at 5.

121. *Id.* There were no Alaska Native tribal representatives included in this collaborative group to implement ASFA's policies, even though the project's termination of parental rights and adoption goals heavily affected Alaska Natives and their tribes. It is not clear why they were left out of this planning process, since including this important group as a team member to decide how to implement ASFA's goals in Alaska was crucial in obtaining overall successful outcomes in CINA cases and in statewide ICWA compliance. Certainly if Alaska Native tribal representatives had been included in the process early on, this would have helped lessen the confusion experienced statewide over the hodge-podge of federal and state child protection statutes and court rules and whether they apply to Alaska child welfare cases. See also SIMMONS & TROPE, *supra* note 38, at 24 (regarding the confusion over ASFA).

tions and holding termination trials involving Indian children.¹²² The court's decisions appear to support the new CINA statutes and the new time frames for filing termination petitions. For example, the supreme court recently applied the new statutory scheme in *J.H. v. State, Department of Health & Social Services*, a case involving a non-Native family.¹²³ Here, the Department provided the mother with a case plan listing the goal of reunification with her child, plus the concurrent goal of termination if reunification did not succeed.¹²⁴ After passage of the new CINA statutes in 1998, the Department quickly moved toward termination of the mother's parental rights.¹²⁵ In September 1998, the Department changed the mother's case plan and listed adoption as the Department's sole goal for the child.¹²⁶ The Department later filed a petition to terminate the mother's parental rights on December 4, 1998.¹²⁷ On appeal, the supreme court found that the lower court was not clearly erroneous in concluding that the mother had failed to remedy her problems within a reasonable time.¹²⁸ It also disagreed with the mother's argument that termination of her parental rights was premature and with her contention that the Department should be equitably estopped from terminating her parental rights.¹²⁹

The issue of premature termination of parental rights also arose in a recent CINA case involving twin Alaska Native children. In *T.F. v. State, Department of Health and Social Services*, the court addressed two parents' arguments that their parental rights had been prematurely terminated under Alaska Statutes section 47.10.088.¹³⁰ The court disagreed with the parents' claims of insufficient time before trial to prove fitness and found that the lower

122. See *M.W. v. State, Dep't of Health & Soc. Servs.*, 20 P.3d 1141, 1143-46 (Alaska 2001); *N.A. v. State*, 19 P.3d 597, 601-02 (Alaska 2001); *C.J. v. State, Dep't of Health & Soc. Servs.*, 18 P.3d 1214, 1217 (Alaska 2001); *C.L. v. P.C.S.*, 17 P.3d 769, 772-77 (Alaska 2001); *L.G. v. State, Dep't of Health & Soc. Servs.*, 14 P.3d 946, 949-55 (Alaska 2000); *S.S.M. v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 3 P.3d 342, 344-47 (Alaska 2000); *A.H. v. State, Dep't of Health & Soc. Servs.*, 10 P.3d 1156, 1160-66 (Alaska 2000); *A.A. v. State, Dep't of Family & Youth Servs.*, 982 P.2d 256, 259-63 (Alaska 1999); *V.D. v. State, Dep't of Health & Soc. Servs.*, 991 P.2d 214, 216-18 (Alaska 1999).

123. *J.H. v. State, Dep't of Health & Soc. Servs.*, 30 P.3d 79 (Alaska 2001).

124. *Id.* at 83.

125. *Id.*

126. *Id.*

127. *Id.* at 84.

128. *Id.* at 87.

129. *Id.* at 86-89.

130. *T.F. v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 26 P.3d 1089 (Alaska 2001).

court had properly applied the factors for termination found under Alaska Statutes section 47.10.088.¹³¹

In a strong dissenting opinion, two Justices disagreed with the majority and stated that the Court had not properly applied the standards found under the ICWA.¹³² The dissent pointed out that under section 1912(d) of the ICWA there could be no termination of parental rights until active efforts had been provided.¹³³ The dissent also acknowledged the short statutory time frame now found for parental terminations, but reminded the court that the ICWA's federal requirements were still supreme.¹³⁴

VI. CONCLUSION

Alaska's CINA statutes should be amended by the Legislature to reflect the important higher standards applicable to Alaska Natives, as found under the ICWA. The result of the Department of Health and Social Services' strict enforcement of the new termination time frames found under the CINA statutes is an increase in the number of Alaska Native parental terminations, increased pressure to break up Indian families and an increase in the number of Native children placed for adoption in non-Native homes. The final and long-term result is the undermining of the stability of Indian tribes in Alaska.

One solution is to amend the CINA statutes to reflect the additional duties owed by the Department in cases involving Indian children. The statutes should highlight the need for the Department to engage in preventative and reunification efforts for Native families. In particular, the statutes should be amended to state clearly that active efforts to rehabilitate and reunify Alaska's Na-

131. *Id.* at 1093, 1097.

132. *Id.* at 1097-99 (Matthew, J. and Bryner, J., dissenting).

133. *Id.* at 1097 (Matthew, J. and Bryner, J., dissenting).

134. *Id.* (Matthew, J. and Bryner, J., dissenting). The dissent in *T.F. v. State* stated:

In 1998 the legislature mandated strict and short time schedules for filing termination petitions and holding termination trials. Acting in response to this new mandate, DFYS and the trial court put this termination proceeding on a fast track. After T.F. was determined to be the father of the children, the active efforts to unite him with his children were unsuccessful because they were necessarily ended by the termination decree. But under ICWA lack of success is a precondition to termination. Termination cannot serve as the reason why active efforts fail to succeed. *It should go without saying based on the supremacy clause of the federal constitution that the requirements of ICWA must be observed even if that means some slippage in the state statutory scheduling requirements.*

Id. at 1098 (Matthew, J. and Bryner, J., dissenting) (footnotes omitted) (emphasis added).

tive families are required in all Indian child welfare cases.¹³⁵ The statutes should reflect that when Alaska Native children are taken into state protective custody, the Department affords Alaska Native children, families and tribes the special rights and protections found under the ICWA.

Also, the statute providing strict time frames for filing petitions for termination and for holding termination trials should be amended so that it is not applied in cases involving Indian children.¹³⁶ If the statute is not amended, the requirement should at least be relaxed so that the decision to file a termination petition in cases involving Indian children is made on a case-by-case basis, regardless of the length of time the child has been in state custody. Under the ICWA, there is no authority for the presumption that after an Indian child has spent a certain number of months in state custody, a parent of the Indian child must or should be terminated as a parent.¹³⁷

Parents of Alaska's Native children should not be treated as cogs in a wheel that moves to terminate a parent's rights once the wheel hits the fifteen-out-of-twenty-two month notch. For example, as stated previously, in many cases it is not possible for the State to provide active efforts to families or for parents to complete case plans within the present short time frame. It is unthinkable that the decision to terminate an Alaska Native parent's rights is based on a presumption of "unfitness" simply because an Indian child has been in foster care for the most recent fifteen months. This decision must instead be made on a case-by-case basis.

135. Alaska Statutes section 47.10.086 (reasonable efforts standard) and Alaska Statutes section 47.10.088 (termination of parental rights and responsibilities) require only a "reasonable efforts" standard, whereas the ICWA and Alaska's court rules provide a higher "active efforts" standard for the state to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family. Compare ALASKA STAT. §§ 47.10.086, 47.10.088 (Michie 2000) with 25 U.S.C. § 1912(d) (1994) and ALASKA CINA Ct. R. 18(c)(2)(B). For a more detailed analysis of this terminology, see Mark Andrews, "Active" versus "Reasonable" Efforts: the Duties to Reunify the Family under the Indian Child Welfare Act and the Alaska Child in Need of Aid Statute in this volume of the Alaska Law Review.

136. See ALASKA STAT. § 47.10.088 (Michie 2000).

137. "[C]hildren who have been in out-of-home care for 15 of the previous 22 months have been in custody too long." Balloon Project Report 2001, *supra* note 60, at 3; see also Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 139 (1995) ("Unfortunately, it is understandably easier to develop timelines and standards for when termination actions should be filed once children have entered foster care than to enforce rigorously strict compliance with preventive and reunification efforts.").

The termination of parental rights in cases involving Indian children is a drastic measure that should be reserved for those cases in which, “despite all efforts to maintain a legal family unit, reunification is not possible and freeing a child for adoption will serve the [Indian] child’s best interests.”¹³⁸

Termination of parental rights should also not occur when an Indian child’s potential for adoption is limited.¹³⁹ The rate of terminations should not exceed the number of adoptions, especially when Alaska Native children are involved. The Indian child’s link with his or her parents, grandparents, extended relatives and tribe should instead be jealously guarded and nurtured, as ICWA mandates. This is especially important if an adoptive placement compliant with the placement preferences under the ICWA has not yet been found.

Alaska’s child protection laws should be amended so that they comply with, and do not conflict with, the ICWA. These changes will in turn help guarantee the continued protection and viability of Alaska’s tribes, as intended by the safeguards imposed under the ICWA.

138. Guggenheim, *supra* note 137, at 136.

139. See DeMichele, *supra* note 44, at 763; see also Guggenheim, *supra* note 137, at 136-37.